

WORKSHOP ON CONTRACT ADR

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Overview

- Background of ADR program
- Transitioning of program
- Current emphasis
- Recent developments
- Future trends
- ADR resources
- Discussion

Background

- ADR is usually defined as any procedure agreed to by the parties to resolve a dispute by means of a third party neutral
- Typical ADR techniques include mediation, facilitation and arbitration
- Mediation and facilitation are preferred methods

Benefits of ADR

- Compared to litigation, ADR usually saves time, money and resources
- May avoid adverse precedent
- Usually allows parties to control dispute resolution process
- Allows parties to resolve real issues in dispute instead of procedural hurdles

How Neutrals Help the Process

- Neutrals defuse controversial issues
- Neutrals provide “reality testing”
- Neutrals supply trust to allow the parties to accept settlement terms (overcoming “reactive devaluation”)
- Neutrals share expertise and options that parties did not consider

Contracting Authority for ADR

- Protest issues – FAR 33.103
- Contract disputes – FAR 33.201, 33.204, 33.214
- Disputes clause – FAR 52.233-1
- DLAD 5145.1
- DLAD 4105.1, Subpart 33.2

DLA Policy on ADR

- If parties cannot resolve dispute through unassisted negotiations –
- ADR must be considered and management decision not to use ADR must be explained in writing by official at least one level above the deciding official, after consultation with counsel (DLAD 5145.1)

Transitions

- DLA's ADR Program focused on resolving EEO complaints
- Use of ADR in contract arena sporadic
- Early successes / lessons learned
- Recent emphasis on ADR in contracting stems from various factors (PMRs; GAO decisions; court cases)

Current Emphasis

- Think “dispute avoidance” in addition to “dispute resolution”
- ADR language in solicitations and contracts
- Dispute escalation clauses
- ADR language in final decisions
- Consider ADR for protests and settlement discussions

Recent ADR Developments

- OFPP and DoD Policy Memoranda
- Use of “outcome prediction” technique for GAO bid protests
- General Counsel’s increased support for using ADR to avoid litigation
- PMR scrutiny of ADR decisions and documentation

Trends

- More use of ADR to avoid and resolve contract disputes
- Increased scrutiny of cases where ADR is not used for adequate justifications
- Use ADR in “high profile” cases

ADR Resources

- Counsel & Office of Procurement Management's web sites
- DLA's ADR web site:

<http://www.dsccl.dla.mil/offices/legal/adr/adr.html>

Other web sites of interest:

<http://www.adr.af.mil/Welcome.html> (Air Force ADR)

<http://www.usdoj.gov/adr/> (Interagency ADR Working Group)

<http://www.thecre.com/fedlaw/legal89.htm> (Fed Law ADR site)

Questions

- Contact Tom Dougherty (x 7179) for questions concerning ADR
- Contact Commodity Counsel